No. 6012

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

YEE SING JONG, on behalf of YEE DONG TUN (detained),

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE

GEORGE J. HATFIELD,
United States Attorney,

LUCAS E. KILKENNY,
Asst. United States Attorney,
Attorneys for Appellee.

Neal, Stratford & Kerr, S F.

TABLE OF CONTENTS

TABLE OF CASES CITED

No. 6012

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

YEE SING JONG, on behalf of YEE DONG TUN (detained),

Appellant,

vs.

JOHN D. NAGLE, Commissioner of Immigration, Port of San Francisco, California,

Appellee.

BRIEF AND ARGUMENT FOR APPELLEE

A. STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court for the Southern Division of the Northern District of California, denying detained's petition for a writ of habeas corpus.

Detained, a Chinese boy, born October 30, 1917, applied for admission into the United States as the foreign born son of Yee Quing Sheck, alias Yee Quong Look, who claims to be an American citizen, by reason of being himself the son of one Yee Ying Ock, a citizen of the United States.

Detained was denied admission by a Board of Special Inquiry at San Francisco on the ground that he had not reasonably established either that his alleged father Yee Quing Sheck is a citizen of the United States, or that detained is the son of said Yee Quing Sheck. This decision was affirmed on appeal by the Secretary of Labor (Tr. pp. 21 to 27).

B. ARGUMENT.

(a) THE DECISION OF THE ADMINISTRATIVE OFFICERS IS SUPPORTED BY THE EVIDENCE.

Detained contends in effect:

(a) That the evidence in support of his claim was so conclusive that the action of the administrative officers in denying him admission was an abuse of discretion, and

(b) That the hearing before the Board of Special Inquiry was unfair, by reason of the use made of certain letters, which will be hereinafter discussed.

The petition, and supplemental amendments to petition for writ of habeas corpus, which were filed in the Court below (Tr. pp. 2 to 8 and pp. 20 and 21) did not raise the second contention. A reference to such a contention first appears in the assignment of errors (Tr. pp. 51 to 56).

In

Dea Hong, et al., v. Nagle, 300 Fed. 727

this Court said:

> "This disposes of the two grounds upon which the application for writ of habeas corpus was

based, *and beyond them we are not at liberty to inquire.*"

Testimony was given before the Board by the applicant, by his alleged father, and by one Tang Hung Shun, an unrelated witness, whose knowledge of the issues is confined to his testimony that he once visited detained's home in China on May 30, 1928.

The adverse decision of the administrative officers is based upon the following facts:

1. Detained's alleged father testified that he has a brother, Yee Quing Poy; that the latter is now living in Canton City, but that a son of the latter, Yee Yook Ming, aged nine, was living in detained's home village the last time he was at home, and that Yee Yook Ming was living in that village because he wanted to attend school there (Tr. pp. 11, 43 and 44). Detained's alneged father was at home in China from November, 1926 to June, 1928 (Tr. p. 30).

Detained testified that he has never seen his alleged cousin, Yee Yook Ming, and that the latter has never lived in detained's home village (Tr. p. 45).

2. Detained's alleged father testified that the schoolhouse in detained's home village is located in the row of houses immediately next to the row in which his home is situated.

Detained testified that there is one row of houses between his house and the school.

3. The testimony of detained's alleged father is that his names are Yee Quing Sheck and Yee Quong

Look; that he has never at any time been known by any other name, and that he is the son of Yee Ying Ock, alias Yee Sing Jeung; that he has four sons, including detained, and also had a daughter who died; that he himself was born in China, and was admitted into the United States as the son of a citizen, viz., as the son of the aforesaid Yee Ying Ock, alias Yee Sing Jeung (Tr. pp. 30 to 33 inclusive).

After being shown a certain letter, which had been received by the immigration officers, containing alleged information relative to the family history of detained and his alleged father, the detained testified that his father's true name is Yee Kay Shuck, and that Yee Quing Sheck is the name in his father's record which he uses to come to the United States. Detained then denied that he knew who his paternal grandfather is, and testified that Yee Ying Ock, alias Yee Sing Jeung, is not in fact his grandfather. Detained further testified that he has one brother at home, and that his father had three daughters who did not live. Later detained said that he had two brothers at home, and finally said that he had three brothers (Tr. pp. 34 to 38, inclusive).

4. Detained's alleged father testified that his two alleged brothers, Yee Quing Soon and Yee Quing Poy, are now living in Canton City; that he saw the latter in China in 1927, and talked to him; that neither of these alleged brothers has ever worked in any of the government offices in China, and that neither has ever been in the Chinese army or any of the Chinese revolutionary forces to his knowledge (Tr. pp. 40 to 43).

Yee Ying Ock, alleged father of Yee Quing Sheck, testified in 1924 that his son Yee Quing Soon was employed as a clerk in the Treasury Department of the Canton City government, and had been so employed for four or five years (Tr. p. 38). On December 9, 1924 he filed with the immigration authorities two letters addressed to him by two nephews, advising him that his sons, Yee Quing Soon and Yee Quing Poy, had been killed in battle (Tr. pp. 38 to 40, inclusive).

1. Regarding the first point mentioned above, it is contended at pages 28 and 29 of detained's brief that it is entirely possible that Yee Yook Ming, alleged cousin of detained, paid a brief visit to detained's village during the time that detained's alleged father was there, but that detained was unaware of such visit.

The testimony on this particular point is set forth in full at pages 43 to 45 of the transcript. The alleged father of the detained was home in China from November, 1926 until June, 1928, when he brought the detained to the United States with him (Tr. p. 30). The testimony of the alleged father is that his nephew, Yee Yook Ming, is now living in detained's home village; that the reason he is living there, and not with his mother in Canton City is because he wanted to attend school in the home village; and that the last time he, the witness, was in China, this alleged nephew was living with the paternal grandmother (Tr. pp. 43 and 44). The detained testified that he has never seen Yee Yook Ming (Tr. p. 45).

The record shows that the home village in question consists of about twenty-five houses (Tr. p. 46). As to the suggestion of detained that possibly Yee Yook Ming merely made a short visit to the home village, of which the detained was unaware, we invite attention to the testimony of the alleged father of detained that the reason Yee Yook Ming is living in Kew How Village, instead of with his mother is because Yee Yook Ming wanted to attend school in the home village. The alleged father on being asked how long that boy had been *living* in the village, stated that he did not know, but the last time he, the witness, was at home in China, the boy *lived* there. He was also asked this question, and gave this answer:

> "Q. Who is *living* in the same house with your mother? A. The wife of my brother, Yee Quing Soon, and her two sons, and also my nephew Yee Yook Ming * * *" (Tr. p. 44).

We submit that this testimony does not bear out the purported explanation in detained's brief.

In any event, the question of whether or not there is an explanation of such discrepancy is one for the administrative department.

> *Lee How Ping v. Nagle* (C. C. A. 9), 36 Fed. (2d) 582;
> *Quan Jue v. Nagle* (C. C. A. 9), 35 Fed. (2d) 505;
> *Yee Mon v. Weedin* (C. C. A. 9), 34 Fed. (2d) 266.

It is difficult to imagine that the detained could be ignorant of the fact that a first cousin of approxi-

mately his own age was living in the home village, and was in fact a member of the household of his paternal grandmother. We submit that this clear-cut conflict on a family matter casts considerable doubt upon the claim that detained is a member of that family.

In the recent case of

Tse Yook Kee v. Weedin, 35 F. (2d) 959,

this Court, in considering certain discrepancies in the record, said:

> "Some are not highly material, and others are difficult to reconcile with the theory of honesty and good faith. An example of the latter is the testimony in respect to the feet of the mother of Tse Pak Cheong. She lived in the little village of only five or six houses where the applicant claims to have been born and reared, and of her all should have had exact knowledge."

We submit that the same language is applicable here, and that if the claimed relationship actually exists the detained should have had exact knowledge as to whether his first cousin was living in the home village immediately prior to the time the detained started for the United States.

2. Regarding the conflict as to the location of the village schoolhouse, detained's brief suggests that there are two schoolhouses in the village, and further that a difference in the direction from which each witness started his figuring would account for the apparent discrepancy.

As to the first branch of this purported explanation,

the detained testified that there is only one schoolhouse in the village (Tr. p. 47).

In order to ascertain whether there is in fact a conflict on this point, it is necessary briefly to visualize the layout of the village. Detained testified that the village consists of about twenty-five houses in five rows; that his own house is the third house on the first row at the south, and that the schoolhouse is situated on the first space of the third row, or *middle* row.

Picture this village in the form of a square consisting of five rows, each row containing five separate houses. The alleged father and detained both testified that the home is the third house on the first row at the south (Tr. p. 47; Immigration Record 55669/421, page 15). The father testifies that the schoolhouse is located in the first space on the fourth row, counting from the north. It is obvious, therefore, that the alleged father in testifying thought of the rows as running in an east-west direction. The only question, then, is whether the applicant was considering the rows as running in a north-south direction. In locating the house, the testimony of the detained expressly shows that he is considering the rows as running in an east-west direction.

In locating the schoolhouse, the detained said: "It is located on the third row, or middle row, on the first space of that row." If he were thinking of the rows as running north and south, instead of east and west, as contended by his counsel, this would bring the schoolhouse either on the same location as the family

home, or the first building at the other end of such row, which would make three houses between the home and the school. It is obvious, therefore, that the purported explanation is utterly without support in the record, as even if true, the parties would still be in disagreement.

It is claimed that the detained attended school in the schoolhouse mentioned for two years before he came to the United States, and since the alleged father was also in the home village for nearly two years at that time, the location of this building should be within the exact knowledge of both parties.

3. No explanation of the conflicts mentioned under No. 3 above is attempted by appellant, except his suggestion that the detained made the contradictory statements as to his family, because he had been shown a letter which purported to have come from his grandmother, and hence he made statements calculated to bring himself into agreement with the contents of the letter, because he did not wish to impugn the veracity of his grandmother.

It is obvious, therefore, that what this argument amounts to is this: That the damaging testimony of the detained is false, and this conclusion is reached by speculation as to a purported motive which the detained might have had to testify falsely. In the very recent case of

> *Chin Lim v. Nagle* (C. C. A.) 5965, decided February 24, 1930,

this Court said:

> "The petitioner claims that the reason he testified falsely in 1894 was because he believed it was necessary to do so because of the rulings of the Department of Labor * * *, the idea apparently being that as he had a good reason for committing perjury in 1904, and has no reason for committing perjury now his story now should be believed rather than the story told in 1904. The fact is that his motive has merely shifted * * * However that may be, it was the duty of the immigration authorities to determine which statement they would act upon."

It being obvious, therefore, that the existence of a possible motive for falsifying does not compel the trial body to disregard the testimony in question, we proceed to consider that testimony.

The claim upon which the detained rests his right to admission is, first, that Yee Quing Sheck is his father, and, second, that Yee Quing Sheck is a citizen of the United States because he is the son of Yee Ying Ock (Dock).

The testimony of the alleged father of detained is that his names are Yee Quing Sheck and Yee Quong Look, and that he has never at any time been known by any other name, and that he has never been known by the name of Yee Kay Shuck. He further claims that he has four sons, including the detained, and that he also had one daughter who died. He testified that his mother is Wong Shee, who is now living in the home village (Tr. pp. 30 to 33 inclusive).

The detained at first testified substantially to the same particulars (Tr. p. 34), but after the contents of a letter were read to him, which letter purported

to come from his alleged paternal grandmother, he stated that his father was Yee Kay Shuck, that he himself had a younger brother, and that his father had three daughters who did not live. He testified further that Yee Quing Sheck is his father's record name, that is, it is the name in his father's paper, which he uses to come to the United States. He testified that his father's mother died the year before last in the home village in China; that he had never heard the name of his paternal grandfather, and that the person, Yee Ying Ock, whom he had formerly testified was his grandfather, is not actually his grandfather. He testified further that he has one brother, and never had any other brothers. He denied that he had ever said that he had three brothers; stated he had been mistaken when he said that he had one brother, and that he really has two brothers. He finally reverted to his original testimony that he has three brothers (Tr. pp. 34 to 38, inclusive).

This testimony, then, contradicts the claim that detained's alleged father is a citizen of the United States, by contradicting the claim that he is the son of Yee Ying Ock. It also discloses a direct conflict as to whether the alleged paternal grandmother of the detained is living or dead. It also shows that the detained claims his father's name to be one which the alleged father states he has never used. It is directly contradictory of the claim that the alleged father has four sons and had only one daughter who died.

In

Siu Say v. Nagle, 295 Fed. 676

this Court said:

> "Admittedly there was a change in the testimony, and, whether the inference drawn by the inspector was warranted or unwarranted, it does not follow that the inspector was prejudiced, or the hearing unfair."

That this conflicting testimony relates to material matters is unquestionable. The claimed American citizenship of detained is based upon the claim of relationship to his alleged father, and of the latter's relationship to Yee Ying Ock. Detained's testimony is that Yee Ying Ock is not his grandfather, that he has never seen his paternal grandfather, and that he has never heard the name of his paternal grandfather.

A situation similar to this arose in the case of

Wong Lim v. Nagle, 30 Fed. (2d) 96

wherein the appellant claimed to be the foreign born son of a Chinese person, who claimed to be a native born citizen of the United States. This Court held that testimony of the applicant that his alleged father was born in China, and had been later naturalized in the United States, showed either that the applicant was not the son of his alleged father, or that the latter was not a citizen of the United States.

The testimony of detained that the true name of his father is Yee Kay Shuck, and the denial of his alleged father that he has ever been known as Yee Kay Shuck creates a direct conflict on the question of the identity of the father of the detained.

In

Soo Hoo Yen ex rel. Soo Hoo Do Yim v. Tillinghast, (C. C. A. 1) 24 Fed. (2d) 163

the relator testified that he had always been known by the name of Soo Hoo Do Yim, whereas testimony of his alleged father was to the effect that relator had been known by another name up until he reached the age of eleven or twelve years, when his name was changed. It was held that such a conflict formed sufficient basis for the excluding decision of the Board of Special Inquiry, holding that the claimed relationship had not been established.

A conflict as to whether or not the paternal grandparents of the applicant are living or dead has frequently been held material in these cases:

Moy Chee Chong v. Weedin (C. C. A. 9) 28 Fed. (2d) 263;
Weedin v. Jew Shuck Kwong (C. C. A. 9) 33 Fed. (2d) 287;
Quan Jue v. Nagle (C. C. A. 9) 35 Fed. (2d) 505.

Authorities holding that conflicts as to the number of children in the applicant's alleged family are material would hardly seem to be necessary, but on this point we cite the following:

Louie Tin et al. v. Nagle (C. C. A. 9) 24 Fed. (2d) 964;
Weedin v. Jew Shuck Kwong, supra.

4. It is contended in appellant's brief that Yee Ying Ock was not testifying from personal knowledge,

with regard to the alleged deaths in 1924 of two of his sons. However that may be, we submit that the weight to be attached to such a conflict was a question for the administrative officers.

This Court has frequently laid down the rule relative to the scope of the inquiry on habeas corpus in these matters. In

Tse Yook Kee v. Weedin, supra,

this Court said:

> "The only question for our consideration, therefore, is whether, in declining to accept the testimony of the applicant and other witnesses as being sufficient to establish the relationship, the immigration officers acted against reason."

With the exception of the conflict relative to the location of the village schoolhouse, the discrepancies relate entirely to matters of family relationship and family history. Under the authorities hereinbefore cited, we submit that such conflicting testimony furnishes ample basis for the excluding decision of the executive.

Applicant suggests that the question of the father's citizenship has been before the department repeatedly, and has been established. Such findings in the case of citizenship of the father have relevancy only to his own right to be admitted into this country, and do not operate in this case as an estoppel in favor of the detained, inasmuch as he was not a party to any of the proceedings referred to. On this matter we quote from the decision in

White v. Chan Wy Sheung, 270 Fed. 765, 767.

"It remains to be considered whether the judgment of the court below is sustainable on the ground on which it was based, that the department should have been bound by its own prior adjudications in admitting the appellee's father and his two brothers as citizens of the United States. The board of immigration is not a court. It is an instrument of the executive power, and its decisions do not in a technical sense constitute res adjudicata, (citing cases), and the department is not bound by its prior decisions in admitting aliens to the United States (Citing cases). We are unable to see how any principle of estoppel can apply in favor of the appellee from the fact that his father and his two brothers were admitted to the United States as citizens thereof. The appellee was in no sense a party to the proceedings in which those decisions were made, and he was not represented therein. His right to enter the United States depends solely upon the question whether his father was born in the United States. On his application for admission that question was determined adversely to him.

The judgment of the court below is reversed, and the cause is remanded, with instructions to dismiss the writ and remand the appellee to custody."

(b) THE HEARING BEFORE THE ADMINISTRATIVE OFFICERS WAS FAIR.

As stated above, no contention of unfairness in the manner of the hearing was made in the petition for writ of habeas corpus, which was filed in the Court below. However, we proceed to a consideration of that contention.

The claim of unfairness refers to the use made by the immigration authorities of the letters purporting to have been sent to them by Mrs. Yee Ying Duck.

Detained charges,

> "Finally they resorted to springing a trap on the child under their control; and they deliberately informed him that his grandmother had written them letters contradicting what he had said." (Appellant's Brief, p. 4)

What actually occurred with regard to the use of these letters appears at pages 34 to 38 of the Transcript. Detained was advised by the Board, as follows:

> "Information has been furnished to this office that the person who brought you to the United States is named Yee Kay Shuck."

This, detained denied. Thereupon the record shows that the contents of the letter signed, Mrs. Yee Ying Duck, was read to detained, after which he was asked this question:

> "Have you any comment to make on the contents of this letter?"

and it was thereafter that the detained gave the contradictory testimony above referred to.

The record shows, therefore, that the above mentioned charge of detained is not true. The Board simply read to the applicant a letter purporting to be signed with the name of the alleged grandmother of detained, and asked detained whether he desired to comment on the contents of the letter. The Board made no other representation whatever to the detained, relative to this letter.

The theory of appellant's argument is that the detained was led to believe that the letter was from his

grandmother, and so believing, he found himself in the predicament where he must either change his testimony to conform to the information contained in the letter, or else cast insult upon his grandmother by denying the truth of the statements in the letter. Appellant also suggests that owing to the youth of the detained, and the peculiar respect which Chinese children have for their grandparents, the procedure followed by the Board was particularly unfair in this instance.

There is nothing in the record whatever to bear out the assumption that the detained was imbued with a peculiar respect for the veracity of his grandmother. This seems to be mere speculation on the part of appellant. It is significant that the petition alleges no facts whatever in this regard. As to the youth of the appellant, that, of course, is a matter over which the administrative officers had no control, and they were faced with the necessity of conducting the inquiry by examining such witnesses as were offered.

The position of appellant apparently is that it was unfair to question the detained at all regarding the information which had come to the officers, relative to his case. We submit that having received information, through whatever source, it was the duty of the officers to question the witnesses in an effort to ascertain whether or not an attempt was being made to evade the provisions of the Chinese Exclusion Laws. This, the Board of Special Inquiry did without misrepresentation or subterfuge of any kind, confronting both the applicant and his alleged father with the particu-

lar information that had come to them, and affording the parties full opportunity to deny the truth of those representations, if they so desired.

Furthermore, an examination of the record will disclose that the theory of applicant's argument does not bear analysis. If, as appellant contends, the detained was forced to testify in such a manner as to bring himself in agreement with the contents of the letter, he failed signally in that respect.

The letter charges that the detained is not the son of his alleged father; that the latter is not the son of Yee Ying Ock; that the name of the alleged father of the detained is Yee Kay Shuck; that the latter had three daughters who did not live; and that he had no sons (see pages 35 to 37 of Appellant's Brief).

The testimony of the detained after this letter was read to him is that he really is the son of his alleged father, who brought him to the United States; that his alleged father is really named Yee Kay Shuck; that Yee Kay Shuck is not the son of Yee Ying Ock; that Yee Kay Shuck had three daughters who died, but that he, the detained, has brothers, first stating that he had one brother, later claiming that he had two brothers, and finally reverting to the original claim that he had three brothers (Tr. pp. 35 to 37).

It appears, therefore, that the detained specifically contradicted the charge in the letter that he is not the son of the man who brought him to the United States. He also contradicted the charge in the letter that his alleged father had no sons. If, in making the state-

ments referred to, detained had been actuated solely by a desire to make his testimony agree with the charges which he believed to have been made by his revered ancestor, even his youth would hardly explain why he would select certain features in the letter with which to agree, and at the same time deny other equally important statements in the letter. So far as we are aware, there are no authorities holding that due process of law requires the administrative officers to refrain from questioning an applicant out of deference to his youth, or to supposed racial characteristics which might impel him to make compromises with the truth.

It is undeniable that an applicant for admission into the United States is entitled to a fair hearing. It is equally undeniable that the immigration laws are designed not only to safeguard the rights of applicants for admission, but also to protect the United States from fraud in such applications. The Board of Special Inquiry was under a duty to investigate the possibility of fraud in this case, and we cannot see that due process of law required them to confine their questioning of the witnesses to such matters as could be readily answered without any possibility of embarrassment to the witnesses.

Some suggestion is made in appellant's brief that if counsel for the detained had been informed as to the receipt by the immigration officers of the letters purporting to be signed by the wife of Yee Ying Ock, steps would have been taken to secure the deposition of that woman. It is noted, however, that after the entire record was thrown open to the inspection of

counsel by the Commissioner of Immigration, no application was made to the immigration authorities for an opportunity to offer her testimony, or any testimony.

We agree that the letters themselves would not be competent evidence of the facts which they purport to state. However, we do not agree that the administrative officers are precluded from questioning witnesses as to information which has been received by them.

We submit that the decision of the Court below, denying the petition for writ, was correct, and should be affirmed.

Respectfully submitted,

GEORGE J. HATFIELD,
United States Attorney,

LUCAS E. KILKENNY,
Asst. United States Attorney,
Attorneys for Appellee.